Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1894

PETER REID WATSON,)

Petitioner,)

vs.)

UNITED STATES OF AMERICA,)

Respondent.)

PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
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OCTOBER TERM, 1977

No._____

PETER REID WATSON,)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

PETER REID WATSON,)

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PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Peter Reid Watson, by and through his undersigned counsel, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this criminal case on May 25, 1977.

OPINION BELOW

The judgment sought to be

reviewed is not reported in the official reporter. A copy of the per curiam affirmed decision in slip form is appended hereto (E-1)*. No opinion was rendered in this cause presumably because of a previous opinion rendered in a companion case on February 18, 1977. The companion's opinion is styled UNITED STATES v. JOHNSTON and may be found at 547 F. 2d 282 (5th Cir. 1977).

JURISDICTION

The judgment sought to be reviewed is final and was dated and entered May 25, 1977. Jurisdiction to review this decision by certiorari is conferred by Title 28 U.S.C. §1254.

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*References to the exhibits are designated by the abbreviation "E" followed by the page number.

QUESTIONS PRESENTED

I.

WHETHER A MAILING IN THE COLLECTION PROCESS IS SUFFICIENT USE OF THE MAILS TO FIND MAIL FRAUD, WHERE MONIES WERE SECURED BECAUSE OF BANK ERROR IN ALLOWING WITHDRAWALS THE SAME DAY AS DEPOSIT AND THERE WAS NO NEED, DESIGN OR PLAN TO BEAT THE MAIL IN THE COLLECTION PROCESS TO SECURE THE FUNDS AND NO SUCH PLAN OR DESIGN WAS USED IN SECURING SUCH FUNDS?

FEDERAL STATUTES INVOLVED

Title 18 U.S.C. §1341 reads:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated, or held out to be such counterfeit or spurious article, for the purpose of

executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE AND FACTS

Petitioner Peter Reid Watson and several others were indicted on one count of conspiracy to commit mail fraud and multiple counts of mail fraud (R-1)* Mr. Watson pled guilty to Count 22 of the Indictment, reserving his right to appeal the issue of jurisdiction. Other co-defendants went to trial before a jury in the United States District Court for the Middle District of Florida.

The evidence established that the petitioner was involved in a scheme to

---

*References to portions of the record-on-appeal other than transcripts are designated by the abbreviation "R" placed in parenthesis, followed by the appropriate page number.

defraud funds from various banking institutions. A check drawn on an account in one back would be deposited in another bank. The deposit was indicated as being a cash deposit in each instance. Subsequent to the deposit, the petitioners would withdraw cash from the account. The banks allowed these withdrawals to be made long before the checks on the drawee bank were returned. In each instance there were insufficient funds to cover the deposited checks. (Tr. I, 86, 94, 100-102, 194)*. There was no effort whatsoever to beat the mails to the drawee bank to reflect a false credit on that

*References to transcripts contained in the record are indicated by the abbreviation "Tr", followed by the volume and page numbers.

account so that issued checks would clear. In each case the lack of sufficient funds and consequent "bad" checks were detected as a result of the use of mails. The checks were credited to the account and funds were available immediately. A number of bank officials made it clear that withdrawal of the funds was in no way dependent upon the time lag in the collection process. There normally was a holding period before withdrawals, however, due to bank error that procedure was not followed in this case. (Tr. I, 136-138, 143, 195, Tr. II, 247, Tr. III, 328, 331). It was solely as a result of these gross mistakes that funds were secured. Based on this evidence the court found the petitioner guilty of mail fraud, likewise the co-

defendants who went to trial were found guilty by jury.

I.

A MAILING IN THE COLLECTION PROCESS IS NOT FOR THE PURPOSE OF EXECUTING A FRAUDULENT SCHEME WHERE FUNDS WERE SECURED THROUGH BANK ERROR IN ALLOWING WITHDRAWAL OF MONIES FROM AN ACCOUNT IN WHICH A CHECK HAS BEEN DEPOSITED THE SAME DAY OF DEPOSIT AND THERE IS NO PLAN OR DESIGN TO BEAT THE MAILS TO THE DRAWEE BANK TO SECURE THE FUNDS BY REFLECTING A FALSE BALANCE IN THE DRAWEE BANK UPON WHOM THE DEPOSITED CHECK IS DRAWN.

This case is presented to this court for review under the provision of United States Supreme Court Rule 19, 28 U.S.C.A., which provides that a case is appropriate for review by certiorari in the following cases:

> "(6) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter...or has decided a federal question in a way in conflict with applicable decisions of this

> court; or has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

Under these guidelines, it is clear this case is appropriate for the exercise of this court's power of supervision.

Under the first guideline set out above, review is appropriate where a decision of the court of appeals conflicts with those of other courts of appeal. The second guideline, related to the first, is where a decision of a court of appeals conflicts with decisions of this Court.

The decision in the instant case, as evinced by the opinion in the case of UNITED STATES v. JOHNSTON and

supported by the affirmance in this case, is in direct conflict with those of another court of appeal. The decision in the instant case is also in direct conflict with the decisions of this Court.

In the case sub judice, the court found that use of the mails was for the purpose of executing the scheme because the success of fraud depended on the delay of the check clearing process. It was the court's position that because funds were not withdrawn until the account was credited and the funds were withdrawn before the checks were returned, that the delay caused by the mails was for the purpose of executing the plan. This conclusion is in conflict with the uncontroverted evidence that the funds were received because of

bank error and not because of the delay of the mails.

In the UNITED STATES v. STASZUK, 502 F. 2d 875 (7th Cir. 1974), modified on other grounds at 517 F. 2d 53 (7th Cir. 1974), the court specifically held that the delay in the mail must contribute to the furtherance of the scheme to be violation of the Federal provision. In the instant case, the mailings resulted in the discovery of the scheme after the money had been received, but not to the furtherance of the scheme. The money received was the result of bank error in allowing withdrawals the same day of deposit and not because of any activities regarding the mails.

The facts of this case are even less reconcilable with the decisions

of this Court in KANN v. UNITED STATES, 323 U.S. 88 (1944) and UNITED STATES v. MAZE, 414 U.S. 395 (1974). The decisions in both of these cases have clearly been traversed by the Fifth Circuit Court of Appeals in rendering its decision in the instant case.

In KANN, supra, defendants secured funds and property through fraud and misrepresentation. In the course of the scheme, they secured checks payable to them, cashed them and the checks were mailed from one bank to another in the clearing process. This Court said of these circumstances that the scheme had reached fruition as to each transaction and the fact that there might be future transactions was of no importance. The mailings in the collection process were found to be

collateral and incidental to the scheme.

In KANN, supra, this Court clearly described the nature of the conduct proscribed by the federal mail fraud statute. This Court stated:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud...Also to be distinguished are cases where the use of mails is a means of concealment so that further frauds which are a part of the scheme may be perpetrated. In these cases mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check although it is conceivable that this alone, in some settlings, would be enough. 323 U.S. 94"

The instant case is one in which the mailings in the clearing process were collateral to the scheme conducted by the defendants. The clearing process in no way aided in the furtherance

of the receipt of monies. In spite of these facts, and in direct conflict with the KANN decision, the circuit court held that delay in the collection process was sufficient in itself to bring the case within the mail fraud statute, regardless of how remote that was from the perpetration of any offense.

The decision by the circuit court also conflicts with the case of UNITED STATES v. MAZE, 414 U.S. 395 (1974). In that case, defendant used someone else's credit card to secure goods and services. The invoices were sent by mail to the responsible bank for collection and it was this mailing the government claimed supported its position that the mail fraud statute had been violated. This Court rejected

that contention because (1) the plan reached fruition as a result of something other than the mailings; (2) the successful completion of the mails increased the probability that the scheme would be detected; (3) there was no "lulling" of the victims. The Court stressed the fact:

> "There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances, mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance and not the mail service which causes the time lag in the physical transmission of such correspondence. 414 U.S. 403."

See also, PARR v. UNITED STATES, 363 U.S. 370 (1960).

In the instant case, petitioner secured funds for reasons wholly unrelated to the mails. That is, the money was secured due to bank error in allowing withdrawals the same day of deposit. The delay in each transaction was caused by the distance, and not by virtue of the mails. The distance involved consisted of the distance between Federal Reserve Banks and drawer banks. The mailings would have caused the detection of the plan, if anyone had bothered to report it. No one did in this case and thus the bank error and not the mails aided in the perpetration and execution of the securing of the money.

These conflicts provide a firm foundation upon which this Court should

accept jurisdiction over this case. This foundation is strengthened by the fact that the instant case is in conflict with decisions of the Fifth Circuit Court of Appeals as well. This case is exemplary of a departure from accepted and usual course of proceedings.

In the companion case of UNITED STATES v. JOHNSTON, the court relied upon its own decisions in UNITED STATES v. SHEPHERD, 511 F. 2d 119 (5th Cir. 1975); and UNITED STATES v. CONSTANT, 501 F. 2d 1284 (5th Cir. 1974), cert. den. 420 U.S. 910 (1975). These cases are obstensibly the same foundation upon which the circuit court affirmed in the instant case without rendering an opinion. A close look at these cases shows they fail to support the

circuit court's judgment herein.

In SHEPHERD, supra, the court held that a check kiting scheme constituted mail fraud for the reasons that (1) the defendant did not intend to irrevocably receive the proceeds of the scheme, but only to obtain a period of "forced credit"; (2) the scheme was ongoing; and (3) the mails caused a delay which permitted the "forced credit" and the continuation of the plan. In SHEPHERD, the court held:

> "As in CONSTANT the use of the mails by Shepherd was a central element of the scheme. Shepherd's receipt of forced credit involved a series of deposits of worthless checks to cover the dishonor of prior worthless checks. Consequently, not only did he obtain forced credit during the collection process of the initial checks deposited, but he was able to extend this credit by subsequent deposits of worthless checks. The delay caused by the mails was therefore doubly

crucial." 511 F. 2d 122.

The Fifth Circuit has held under its decision that the mailing must be a central element in the scheme and intended for the purpose of concealment. It must permit continuation of the scheme and must serve to assist the plan.

In our case, this is not the circumstance. There was no effort to take advantage of the mail-caused delay to rush between banks to obtain forced credit. The funds were irrevocably obtained. Under these facts, the Fifth Circuit has incorrectly applied its previous decision in SHEPHERD.

Petitioner is well aware of the Court's overwhelming case load and recognized the need to present a strong case to compel this Court to expend

precious minutes in deciding still another case. This case we feel presents such facts as should be reviewed and decided upon by this Court.

Failure to hear this case may result in an unintended expansion of the mail fraud statute. If the Fifth Circuit's decision stands, the mail fraud statute will be expanded beyond the Congressional intent and indeed beyond Constitutional authority. The Fifth Circuit has forgotten and has traversed this Court's admonition in KANN v. UNITED STATES, supra, at 95, that:

> "The mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

This case is not one of the limited instances to which the mail fraud statute is meant to apply. Failure to rule on this case will lead to confusion and misunderstanding in future applications of the mail fraud statute.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

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Petitioner,)
vs.)
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Respondent.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the United States Attorney, United States Post Office and Courthouse, Tampa, Florida, and to the Solicitor General, Department of Justice, Washington, D.C., 20530, by United

States Mail, this 22nd day of July,

1977.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 76-1721, 76-2013
76-2014, 76-2015
and 76-2158
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HOWARD SYLVESTER LAWSON,
also known as "Joe,"

Defendant-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER REID WATSON,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RALPH WALDO FLANDERS,

Defendant-Appellant,

EXHIBIT 1
(page 1 of 2 pages)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE R. TINDALL,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD DEE PLUMLEE, SR.,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Florida

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(May 25, 1977)

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of

New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977.

PETER REID WATSON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. 77-189
ARNOLD DEE PLUMLEE, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. 77-219

A P P E N D I X

PETITION FOR A WRIT OF CERTIORARI FOR THF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977.

PETER REID WATSON, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. 77-189
ARNOLD DEE PLUMLEE, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	No. 77-219

A P P E N D I X

PETITION FOR A WRIT OF CERTIORARI
FOR THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES of America,

Plaintiff-Appellee,

v.

John Charles JOHNSTON, a/k/a Chuck,

James A. Webber and Ronald Day

Plumlee, Defendants-Appellants.

No. 76-2154
Summary Calendar

United States Court of Appeals,
Fifth Circuit

Feb. 18, 1977

"Defendants were convicted before the United States District Court for the Middle District of Florida, Ben Krentzman, J., of mail fraud and conspiracy to commit mail fraud, and they appealed. The Court of Appeals, Wisdom, Circuit Judge, held that use of mails in connection with interstate banking transaction was foreseeable and that relation of scheme, success of which depended on delay caused by use of mail in check-clearing process, and the mail was sufficiently close to justify application of federal statutes, that defendants who were involved in same series of bank fraud transactions were properly joined, that joint trial did not prejudice individual defenses, and that evidence was sufficient regarding participation of one defendant in conspiracy.

Affirmed."

David A. Demers, St. Petersburg, Fla., for John Charles Johnston and Ronald Day Plumlee.

Richard H. McInnis, Tampa, Fla. (court appointed), for James A. Webber.

John L. Briggs, U.S. Atty., Jacksonville, Fla., Terrance A. Smiljanich, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM, GEE and TJOFLAT, Circuit Judges.

WISDOM, Circuit Judge:

These three defendant-appellants appeal their convictions for mail fraud and conspiracy to commit mail fraud. They present four issues for review. First, they argue that they did not cause the United States mails to be used in connection with fraud. Second, they contend that the use of the mails was not sufficiently related to the fraudulent scheme to trigger federal jurisdiction. Third, they submit that their indictments and trials were improperly joined. Fourth, one defendant, Ronald Plumlee, argues that the prosecution did not offer sufficient evidence to connect him to the conspiracy. We reject these contentions and affirm the judgment of the district court.

This conspiracy involved ten persons, seven of whom have pleaded guilty to charges of mail fraud and conspiracy. The fraud consisted of a series of banking transactions. The defendants would deposit, as "currency", worthless checks usually drawn on out-of-state banks. Through bank error, these deposits would often be credited immediately to accounts as currency, and the accounts would not be frozen until the checks cleared. After determining that the currency credits had occurred, the defendants would withdraw cash from the accounts before the check clearing process returned the original, now dishonored, checks. After a jury trial, Johnston was convicted of seven counts of mail fraud, Plumlee of six counts, and Webber of one count. All were convicted of conspiracy.

(1) UNITED STATES v. MAZE, 1974, 414 U.S. 395, 94 S.Ct., 645, 38 L.Ed. 2d 603, establishes a two-pronged jurisdictional standard to test the relationship of the United States mails to fraudulent schemes. A fraudulent scheme will constitute a federal crime if the defendant "causes" the mails to be used and if the mails are "sufficiently closely related to (the) scheme." 414 U.S. at 399, 94 S.Ct. at 648.

(2) Regarding the first prong of the test, the Supreme Court has retained the causation standard announced in PEREIRA v. UNITED STATES, 1954, 347 U.S. 1, 8-9, 74 S.Ct. 358, 98 L.Ed. 435:

> (O)ne "causes" the mails to be used where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . ."

414 U.S. at 399, 94 S.Ct. at 648. The record in this case shows that defendants Johnston and Webber were experienced businessmen and that defendant Plumlee was a finance major at the University of South Florida. It also shows that the mails were necessarily used in these interstate banking transactions. The district court therefore correctly held that the use was foreseeable. (citations omitted)

Regarding the second prong of the test, the Supreme Court has instructed that the mailing must be "for the purpose of executing the scheme". (citation omitted) But the scheme need not necessarily contemplate the use of the mails as an essential element. This Court has recently upheld the application of the mail fraud statutes to two check-kiting schemes because the success of the schemes depended on the delay involved in the check-clearing process. (citations omitted) The dependency on delay distinguished these cases from MAZE, which involved standard credit card transactions that reached fruition before the mails were ever employed. In the present case, however, the fraud depended on the

delay of the check-clearing process. The defendants did not attempt to cash their bogus checks or to withdraw cash ccincidently with making the deposits. Instead, they waited until the bank had credited their accounts and then withdrew cash before the checks bounced. By the time the checks were returned through the mails by the payor banks, the defendants had withdrawn the money. The success of the scheme depended, then, on the delay caused by the use of the mail in the check-clearing process. SHEPHERD and CONSTANT indicate that this relation between the scheme and the mail is sufficiently close to justify application of the federal criminal statutes.

(3) The defendants also attack their convictions by asserting that they should have been tried separately. Rule 8 of the Federal Rules of Criminal Procedure expressly allows joinder of defendants if the Government alleges that they "participated in the same act or transaction or in the same series of acts or transactions constituting the offense or offenses." According to UNITED STATES v. PEREZ (citation omitted), joinder under the Rule is permissible when the defendants are properly charged with a single conspiracy. Here the bank fraud scheme, described by its organizer as a continuing fraud, constituted a single conspiracy. Although they never worked together, both defendants Plumlee and Johnston deposited checks obtained from defendant Webber and co-conspirator Flanders,

who pleaded guilty. The middleman in all of these transactions was the organizer of the fraud, Plumlee's father, Arnold, who also pleaded guilty. All of the transactions involved the same fraudulent technique, discovered jointly by Johnston and Arnold Plumlee and taught to the younger Plumlee by his father. The transactions also had a common object--to secure money from the banking system before it could discover the worthless checks. In fact, at one point both Johnston and Ronald Plumlee instituted transactions at the same bank. In addition, there was evidence that cash from earlier frauds financed later transactions. Consequently, the Government offered sufficient proof of a single conspiracy, and the district court properly joined the defendants who were involved in the same series of bank fraud transactions. (citation omitted)

The defendants cite UNITED STATES v. MARIONNEAUX (citation omitted) and UNITED STATES v. BERTOLOTTI (citation omitted), to support their theory of improper joinder. Neither case applies to the present facts. In MARIONNEAUX, we held that the Government could not join the defendants of two alleged conspiracies in a single trial. Here, of course, there is only one conspiracy. In BERTOLOTTI, the Government attempted to join in one trial and one narcotics conspiracy nearly 30 defendants charged with a variety of crimes. The only common factor was the "presence" of two

persons who pleaded guilty prior to trial. Police memoranda even treated the crimes as several separate conspiracies. Here, on the other hand, there are numerous common factors connecting the relatively few participants in the fraudulent scheme.

(4) We also reject the contention of the defendants that their joint trial prejudiced their individual defenses in violation of F.R.Crim.P. 14. Their theories of the case were remarkably consistent, relying mainly on the jurisdictional defense that the mails were not sufficiently related to the fraud. They did not attempt to transfer culpability to each other. The district court carefully instructed the jury that the case against each defendant should not be applied against the others. The Government was required to specify which piece of evidence applied to which defendant. The jury must have considered and followed the court's instructions, for it acquitted two defendants of separate counts involving two of the nine banking transactions. Consequently, the district court did not abuse its discretion by refusing to grant the motion for severance under Rule 14. (citations omitted)

(5) Finally, we reject the contention of Ronald Plumlee that there was not sufficient evidence to connect him to the conspiracy. The record contains evidence that Ronald participated in

all phases of the fraud--opening accounts, depositing bad checks with deposit slips that indicated currency deposits, withdrawing money from the accounts, and supplying blank checks to his father. He deposited checks supplied through his father by both Webber and another co-conspirator who pled guilty. He was acquainted with both of his co-defendants. All of the transactions for which the jury convicted him occurred after he learned that his first deposit-withdrawal transaction had utilized a check that later bounced. Arnold Plumlee testified that he explained to his son how the transactions worked. After making several of the withdrawals, Ronald split the money with his father and accumulated several thousand dollars. In short, sufficient evidence supported the jury's conclusion that a reasonable doubt did not exist regarding the participation of Ronald in the conspiracy.

AFFIRMED."

Supreme Court, U. S.
FILED
DEC 23 1977
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No. 77-189 and 77-219

In the Supreme Court of the United States

OCTOBER TERM, 1977

PETER REID WATSON, PETITIONER

v.

UNITED STATES OF AMERICA

ARNOLD DEE PLUMLEE SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-189

PETER REID WATSON, PETITIONER

v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. 77-219, Ex. I). The opinion of the court of appeals affirming the conviction of petitioners' co-defendants (Pet. App.) is reported at 547 F. 2d 282.

JURISDICTION

The judgment of the court of appeals was entered May 25, 1977. The petition for a writ of certiorari in No. 77-189 was filed on July 22, 1977, and the petition in No. 77-219 was filed on August 8, 1977. Both petitions are therefore substantially out of time under Rule 22(2) of the Rules of this Court. Jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' scheme to defraud banks violated the federal mail statute, 18 U.S.C. 1341.

STATEMENT

Petitioners and others were charged in an indictment filed in May 1975 in the United States District Court for the Middle District of Florida with conspiracy to commit mail fraud and with multiple counts of the substantive offense, in violation of 18 U.S.C. 371 and 1341. Petitioner Watson pleaded guilty to one substantive count of the indictment and was sentenced to 18 months' imprisonment; petitioner Plumlee pleaded guilty to two substantive counts and was sentenced to three years' imprisonment. In accepting their guilty pleas, the district court acknowledged that both petitioners were preserving their claim that the counts of the indictment did not state an offense and that the district court therefore lacked jurisdiction (Transcript of Rearraignment on February 27, 1976, p. 7); see also *United States* v. *Mirelez*, 496 F. 2d 915 (C.A. 5). The court of appeals affirmed their convictions without opinion (Pet. 77-219, Ex. 1).

Three of petitioners' co-defendants were convicted after a jury trial. Their convictions were affirmed on appeal (Pet. App.). *United States* v. *Johnston*, 547 F. 2d 282 (C.A. 5), certiorari denied, 431 U.S. 942. Petitioner Plumlee testified for the government in the trial.

The conspiracy count of the indictment alleged that the defendants devised a scheme and artifice to defraud certain specified banks and that "[s]aid victim banks were induced by the defendants to accept for deposit worthless instruments in writing, to wit: checks, allowing them to obtain money and property from the victim banks by means of false and fraudulent pretenses * * *." The conspiracy count further alleged that "[i]t was a further part of said conspiracy that the defendants did knowingly cause the victim banks, or their agents, or the drawee banks, to place in the United States mails for delivery by the Postal Service said worthless checks, and did utilize the delay caused by mailing of the worthless checks to further their scheme and artifice to defraud."

Each substantive count of the indictment incorporated the allegations in the conspiracy count and also alleged that in furtherance of the scheme to defraud a specified defendant did cause certain described matter to be delivered by mail. All of the mailings alleged in the substantive counts were either mailings of checks from a depository bank to a drawee bank or mailings of letters from a drawee bank to a depository bank advising that checks sent for collection were not being paid due to insufficient funds.

At the time of petitioners' guilty plea and in order to provide the court with a factual basis for acceptance of that plea, the prosecutor stated that the evidence at trial would show that the petitioners deposited worthless checks in certain victim banks drawn on out-of-state banks, and, utilizing the delay caused by mailings of the checks, returned to the victim banks over a period of several days and withdrew the money before the worthless checks were returned by the drawee banks through the mails. See Transcript of Rearraignment on February 27, 1976, p. 12.

The evidence at the trial of petitioners' co-defendants supported the allegations of the indictment and confirmed the prosecutor's representations. It showed that, in a typical case, one of the defendants would open a checking account in a particular city, usually with small amounts of currency or bona fide checks. After several days, he would then deposit one or more large checks in the account, drawn on accounts in out-of-state banks that contained insufficient funds or no funds to cover the checks. The defendant would incorrectly enter the deposit in the "currency" rather than the "check" portion of the deposit slip. Although all of the victimized banks had a policy under which a depositor was not permitted to withdraw funds deposited by a check for a period of days estimated to be sufficient for the check to be sent for collection and returned, that policy was not followed with respect to the checks alleged in the indictment, either because the teller or the bookkeeping department failed to note that the deposit was by check rather than cash or because the "hold" placed on the deposit by the teller was not transmitted to the bookkeeping department (I Tr. 22, 40-41, 47, 57, 108-109, 131-132, 142, 155-157, 160-161, 186-188; II Tr. 77-78, 80-83, 107).[1]

In the typical case, the defendant, after making the deposit, would call the bank's bookkeeping department after 2:00 p.m.—when all the checks deposited during the day had been posted to customer accounts—to ascertain whether the check he had deposited that day had been credited to his account.[2] If he received an affirmative

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[1]"Tr." refers to the transcript of the trial of petitioners' co-defendants.

[2]This would often be done by posing as a third party asking whether a check he had received from the depositor was good (II Tr. 78, 83).

reply, he would go to the bank the next day or several days later and withdraw all or substantially all of the account in cash, either in one or in several transactions. The evidence disclosed a number of transactions of this kind by all of the defendants, including petitioners (I Tr. 34-35, 134-135, 189-190, 202-203; II Tr. 78, 82-83, 95, 111, 184-195; III Tr. 330).

Officials from the victimized banks testified that the collection process of each bank, by which deposited checks were sent for collection to the drawee bank and either paid or returned unpaid for insufficient funds, employed a combination of private courier services and the United States mail, and that that process typically took six to ten days with respect to out-of-state checks (a period commonly called the "float"). They testified that the defendants' scheme depended for its success on, first, error by the teller or bookkeeper in immediately crediting the defendant's account rather than placing a hold upon it, and, second, withdrawal of the account in cash before the end of the float, at which time the bank would be notified that the deposited check was bad. They also testified that the defendants would not have been permitted immediately to cash the checks when they were presented for deposit (I Tr. 23, 32, 38, 137-139, 142, 198; II Tr. 94; III Tr. 332). There was no testimony, however, that the ability of the defendants to withdraw their accounts in cash depended on the deposited check having *entered* the collection system in general or the mail in particular; rather, that ability depended on the bank's action in erroneously crediting the account.

Petitioners and their co-defendants contended that under *United States* v. *Maze*, 414 U.S. 395, the indictment did not allege, and the evidence did not establish, their use of the mails in furtherance of their scheme and therefore failed to make out a violation of 18 U.S.C. 1341. In *Maze*,

the defendant had stolen a credit card and had used the card to obtain food and lodging at various motels. His indictment under 18 U.S.C. 1341 charged that he had fraudulently obtained goods and services; that he knew that each merchant would send the sales slips through the mails to the collecting bank, which would then mail a bill to the owner of the card for payment; and that the delay resulting from the mailing enabled him to continue purchasing goods and services for an appreciable period of time. 414 U.S. at 397. The evidence at trial supported the allegations in the indictment. This Court held, however, that the evidence did not establish mail fraud in violation of Section 1341 because it did not establish that the mailings were "for the purpose of executing such scheme" to defraud, as the statute requires. The Court reasoned that the fraudulent scheme was complete when the defendant obtained the goods and services and did not depend on the mailings between the merchants, the collecting bank and the owner of the card. The Court also noted that the defendant "probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all." 414 U.S. at 402.

The Court also rejected the government's argument that "essential to the success of any fraudulent credit-card scheme is the 'delay' caused by the use of the mails which aids the perpetrator * * * in the continuation of a fraudulent credit card scheme and the postponement of its detection" (*ibid.*). The Court stated (*id.* at 403):

> But the successful completion of the mailings from the motel owners here to the Louisville bank increased the probability that respondent would be detected and apprehended. There was undoubtedly delay in transmitting invoices to the Louisville bank, as there is in the physical transmission of any business correspondence between cities separated by large distances. Mail service as a means of transmitting such correspondence from one city to another is designed to overcome the effect of the distance which separates the places. But it is the distance, and not the mail service, which causes the time lag in the physical transmission of such correspondence.

In affirming the convictions of petitioners' co-defendants, the court of appeals concluded that *Maze* did not require reversal. The court stated (547 F. 2d at 284):

> * * * [T]he Supreme Court has instructed that the mailing must be "for the purpose of executing the scheme". * * * [*Maze, supra,* 414 U.S. at 399]. But the scheme need not necessarily contemplate the use of the mails as an essential element. *Id.* This Court has recently upheld the application of the mail fraud statutes to two check kiting schemes because the success of the schemes depended on the delay involved in the check-clearing process. *United States* v. *Shepherd,* 5 Cir. 1975, 511 F. 2d 119; *United States* v. *Constant,* 5 Cir. 1974, 501 F. 2d 1284, *cert. denied,* 1975, 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed. 2d 840. The dependency on delay distinguished these cases from *Maze,* which involved standard credit card transactions that reached fruition before the mails were ever employed. In the present case, however, the fraud depended on the delay of the check-clearing process. The defendants did not attempt to cash their bogus checks or to withdraw cash coincidently with making the deposits. Instead, they waited until the bank had credited their accounts and then withdrew cash before the checks bounced. By the time the checks were returned through the mails by the payor banks, the defendants had withdrawn the money. The success of the scheme

depended, then, on the delay caused by the use of the mail in the check-clearing process. *Shepherd* and *Constant* indicate that this relation between the scheme and the mail is sufficiently close to justify application of the federal criminal statutes.

DISCUSSION

As this Court reaffirmed in *Maze*, an offense under the mail fraud statute contains two principal elements: first, that the defendant "cause" the use of the mails; and second, that the use of the mails be "for the purpose of executing" the fraudulent scheme—that is, that the mails be used to some degree in furtherance of the scheme.

With respect to the first element, it is well established that the statute does not require that the defendant himself mail certain matter; the statute encompasses use of the mails in furtherance of a fraudulent scheme so long as the defendant "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended * * *." *Pereira* v. *United States*, 347 U.S. 1, 8-9; see also *Maze, supra,* 414 U.S. at 399.

Under those principles, the indictment adequately alleged that petitioners caused the use of the mails, and the evidence at the trial of petitioners' co-defendants amply supported the charge. In view of the typical method of operation of the defendants' scheme and the fact, noted by the court of appeals, that at least some of the defendants were experienced businessmen knowledgeable about banking procedures, it could fairly be concluded that the defendants foresaw that use of the mails would result from their actions.

With respect to the second element, although the mails must be used in furtherance of the fraudulent scheme, "[i]t is not necessary that the scheme contemplate the use of

the mails as an essential element." *Pereira* v. *United States supra,* 347 U.S. at 8; *Maze, supra,* 414 U.S. at 400. The statute proscribes use of the mails so long as that use to some degree furthers the scheme and prevents or delays its detection. Thus, in *United States* v. *Sampson,* 371 U.S. 75, this Court upheld mail fraud convictions where the defendants were charged with having secured advance fees from customers for future services that the defendants never intended to provide, and with having subsequently mailed letters to the customers acknowledging receipt of the fees. The Court held that the subsequent mailings were in furtherance of the scheme because they were designed to lull the victims into a false sense of security and thus, presumably, to defer or avoid complaints to authorities and the ultimate detection of the scheme. See *Maze, supra,* 414 U.S. at 403.[3]

The indictment in this case alleged that the petitioners and their co-defendants "did utilize the delay caused by mailing of the worthless checks to further their scheme and artifice to defraud," and the prosecutor, to provide the court with a factual basis for accepting petitioners'

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[3]Those principles have been generally followed by the courts of appeals. Thus, in *Ohrynowicz* v. *United States,* 542 F. 2d 715 (C.A. 7), the defendant devised a check fraud scheme similar to the one in this case. When he opened his checking account, he filled out an application for personalized checks, which the bank mailed to the check printing company before the defendant withdrew his account, and that mailing formed the basis of one count of the indictment. Although the defendant never intended to use the personalized checks, the court concluded that the application was necessary to provide an appearance of normality and to enable the defendant to obtain the temporary checks that he used to execute his fraud, and that the mailing was a foreseeable concomitant of his action. The court, however, affirmed the district court's dismissal of those counts which alleged the mailings of collection letters between the defrauded banks. See discussion *infra*, p. 14.

guilty pleas (see Fed. R. Crim. P. 11(f)), described a scheme—later proved in the trial of the co-defendants—that was consistent with the charge. The court of appeals concluded that in view of their reliance on the delay factor in the mails, the defendants could be held to have caused the use of the mails in furtherance of their scheme to defraud.

The difficulty with that rationale is that it does not appear to be materially distinguishable from the arguments rejected by this Court in *Maze*, which we read to have held that reliance on the delay caused by the use of the mails does not by itself constitute use of the mails in furtherance of the scheme. As we argued in *Maze* (Gov't. Br. 23-32), the defendant in that case relied on the delay caused by the use of the mails to perpetrate his fraud. Had he not used a credit system with a collection process entailing delay attributable to use of the mails, he might not have been able to obtain goods and services fraudulently. That type of reliance on the mails, however, was not sufficient to bring his actions under the statute.

There are factual differences between this case and *Maze*, but in light of the way the Court dealt with the government's arguments in *Maze*, we cannot conclude that those are differences in principle justifying a different result. The main difference is that petitioners, unlike *Maze*, did not immediately obtain something of value (here cash) upon their presentation of a fraudulent instrument (here, the worthless out-of-state check) and would not have been able to do so; instead, they waited a day or several days before withdrawing the cash. The court of appeals found it significant that the defendant here had to wait one or two days in order to establish an appearance of legitimacy that would enhance their prospects of carrying out their scheme successfully, that they were able to establish that appearance of legitimacy

because of the delay in the collection process, and that they therefore deliberately took advantage of the delay to provide themselves with the appearance of legitimacy necessary to the success of their scheme.

While these differences between the facts of the instant case and those of *Maze* could supply the basis for a different result—rooted in the more substantial and deliberate reliance of these defendants upon the delays caused by the mails—we find ourselves unable to urge this distinction upon the Court unless it is prepared to reevaluate the analysis adopted in the *Maze* opinion. The ability of the petitioners to obtain cash (like the ability of Maze to obtain goods and services) depended in the first instance on the error of the bank (or the merchants in *Maze*) in relying upon their fraudulent representations of creditworthiness. The fact that it may have required a day or two to induce the banks to commit the error of treating petitioners as legitimate depositors, while Maze was able immediately to persuade the merchants that he was legitimate, is a quantitative rather than a qualitative distinction. Consummation of the fraud in either case did not depend upon the subsequent use of the mails; rather, the significance of the mails in each case was to postpone the detection of the defendants' fraud long enough to permit them to obtain something of value.

It was in connection with the government's argument that Maze had capitalized on the delay inherent in use of the mails that this Court observed that Maze "probably would have preferred to have the invoices misplaced * * * and never mailed at all. * * * [T]he successful completion of the mailings * * * increased the probability that respondent would be detected and apprehended." 414 U.S. at 402-403. While petitioners relied to a materially greater extent than Maze on the delay in the mails in executing their scheme, the foregoing language in the

Maze opinion suggests to us that the Court was not prepared to consider reliance on mail delay alone, no matter how substantial, as sufficient to bring a scheme to defraud within the reach of the federal mail fraud statute so long as the mailings themselves do not assist the consummation of the scheme.[4] Accordingly, unless the Court is prepared to reconsider or limit the rationale of *Maze* in a manner that would give effect to the distinction drawn by the court of appeals in the case of petitioners' co-defendants, we are forced to conclude that petitioners' crime did not constitute an offense under 18 U.S.C. 1341.[5]

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[4]See also *Kann* v. *United States*, 323 U.S. 88, where the defendants were charged with having obtained money by fraud; this money was paid to them in the form of checks, which they then cashed. The mailings alleged were mailings of the checks from the cashing bank to the drawee bank for payment. The Court held that this was not mail fraud. "It was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U.S. at 94.

The instant case might well have been different if the indictment alleged, and the proof established, that the petitioners would not have been able to withdraw any money until the deposited checks *entered* the collection system, in which case it could be said that the petitioners used the mails as a place of concealing evidence in order to successfully perpetrate their scheme. See *Kann, supra*, 323 U.S. at 94. The indictment and proof here, however, only alleged and established that the scheme depended in the first instance on bank error; once that error was made, the defendants were able to withdraw cash from the bank whether or not the deposited checks had left the bank's premises and entered the collection system.

[5]It should be noted, however, that schemes of this kind, which appear to have deliberately utilized co-conspirators in different states, pose substantial difficulties to local and state prosecution. Moreover, although the Court was able to note in *Maze, supra*, 414 U.S. at 404-405, that credit card frauds of the kind involved there are now subject to federal prosecution under another statute, it is not clear whether the check fraud involved here would violate any other federal statute. It may be that petitioner's activities constituted bank larceny in

2. It is important for purposes of Section 1341 to distinguish between the one-step check fraud involved in this case and other schemes, commonly referred to as "check-kiting", in which the mails are clearly used in furtherance of the fraud. The most common type of check-kiting scheme appears to involve a series of banks and a series of interrelated deposits that are transmitted in the mails before the scheme reaches fruition. In a typical case, for example, a defendant would deposit a $1000 check in Bank A drawn on Bank B, a $1000 check in Bank B drawn on Bank C, and a $1000 check in Bank C drawn on Bank A, all before the first check, deposited in Bank A, was presented to Bank B for payment. If Bank B erroneously credited that first check before waiting for Bank C to pay the check drawn on it, this would give Bank A the false impression that the account opened there was *bona fide*.[6] The process would then be repeated with ever increasing deposits, and perhaps many times, until a sizeable deposit is built up in one bank that may be withdrawn. In this type of "round robin" scheme (see *United States* v. *Street*, 529 F. 2d 226 (C.A. 6)), the mails play an instrumental role in the ultimate success of the scheme.

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violation of 18 U.S.C. 2113(a) or taking money from a bank "with intent to steal" in violation of 18 U.S.C. 2113(b), cf. *United States* v. *Turley*, 352 U.S. 407; *United States* v. *Fistel*, 460 F. 2d 157 (C.A. 2), but that is far from clear (see *Le Masters* v. *United States*, 378 F. 2d 262 (C.A. 9); *United States* v. *Rogers*, 289 F. 2d 433 (C.A. 4); *Ackerson* v. *United States*, 185 F. 2d 485 (C.A. 8); *United States* v. *Patton*, 120 F. 2d 73 (C.A. 3)).

[6]All check kiting schemes depend on bank error in paying checks before waiting to ascertain whether deposits made in the bank are collectable.

Most of the decisions affirming convictions for check frauds under the mail fraud statute after *Maze*—including those relied on by the court below—involved this kind of scheme. See, *e.g.*, *United States* v. *Street, supra; United States* v. *Shepherd*, 511 F. 2d 119 (C.A. 5); *United States* v. *Constant*, 501 F. 2d 1284 (C.A. 5), certiorari denied, 420 U.S. 910; cf. *United States* v. *Marando*, 504 F. 2d 126, 130 (C.A. 2), certiorari denied *sub nom. Berardelli* v. *United States*, 419 U.S. 1000; but see *United States* v. *Scott*, 554 F. 2d 866 (C.A. 8).

At least one circuit, however, has held that a one-step check fraud, which does not involve a series of mailings of deposited checks between banks, does not constitute mail fraud even though a worthless check is mailed for collection after the defendant cashed it. See *Ohrynowicz* v. *United States*, 542 F. 2d 715 (C.A. 7); *Strauss* v. *United States*, 516 F. 2d 980, 982 (C.A. 7). For the reasons previously discussed, we believe those decisions to be correct applications of the principles set forth in *Maze*. In our view, accordingly, the court of appeals erred in not recognizing the material differences between the schemes involved in the cases on which it relied and the simple scheme alleged in this case.[7]

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[7]If the Court agrees with our submission that this petition should be granted, and the case remanded unless the Court is prepared to reconsider the reasoning in *Maze*, the Court may consider it appropriate to reconsider its denials of the petition for certiorari filed by petitioner's co-defendants. We are aware of only one other case that appears to have involved a one-step check fraud in which this Court denied the defendant's petition for certiorari. *United States* v. *Gardner*, 551 F. 2d 302 (C.A. 2), certiorari denied, 429 U.S. 1104.

CONCLUSION

Unless this Court is prepared to reconsider or limit the reasoning of its decision in *Maze*, the petition for a writ of certiorari should be granted and the case remanded with directions to dismiss the indictment.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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